Supreme Court, U. S.
FILED
JUN 16 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1982

JAMES E. FULCHER, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

James E. Fulcher, Jr., Pro Se
10739 Tucker Street Suite 201
Beltsville, Maryland 20705
301 937-5048
Petitioner

June 16, 1980

INDEX

Opinion below..... 2
Jurisdiction..... 2
Question presented..... 2
Statutory provisions involved..... 4
Statement of the case..... 5
Reasons for granting the writ..... 9
1. The Decision Below Conflicts With This Court's Principals For Determining Whether A Constitutional Error Might Have Contributed To The Verdict..... 10
2. The Decision Below Conflicts With Decisions Of Other Courts Of Appeal As To The Possibility Of Prejudice In The Absence Of Transcript Or When The Meaning Of A Jury Note Is Unclear..... 13
3. The Decision Below Weakens The Important Constitutional Right Of Appeal And Review By Undermining The Protection Guaranteed Through An Attorney's Presence and A Transcript..... 15
4. The Decision Below Is In Direct Conflict With Rogers v. United States As To Failure To Note An Objection..... 15

5. The Decision Below Conflicts With Other Courts Of Appeal In The Important Constitutional Area Of Whether A Jury's Verdict May Be Hastened..... 17

6. The Decision Below Conflicts With This Court's Principals Prohibiting Requirements That A Jury Reach A Dispositive Verdict..... 19

Conclusion..... 19

CITATIONS

CASES

Burroughs v. United States, 365 F.2d 431 (C.A.10)..... 18

Bustamante v. Eyman, 456 F.2d 269 (C.A.9)..... 14

Chapman v. California, 386 U.S. 18..... 15

Fahy v. Connecticut, 375 U.S. 85.. 10

Jenkins v. United States, 380 U.S. 445..... 19

Rogers v. United States, 422 U.S. 35..... 10

United States v. Flannery,
451 F.2d 880 (C.A.1)..... 18
United States v. Schor,
418 F.2d 26 (C.A.2)..... 13
United States v. United States
Gypsum Co. ET AL., 438 U.S.
422..... 19

MISCELLANEOUS
Devitt & Blackmar, FJP & I, 3rd
Ed., Vol. 1, Sec. 5.19..... 18

Appendix (Opinion and Judgements
of Court of Appeals).... App. 1
(Order Extending Time To
File Petition For Writ Of
Certiorari)..... App.10
(Order Denying Petition
For Rehearing In The
Court Of Appeals)..... App.11
(Order Denying Petition
For Rehearing En Banc
In The Court Of Appeals. App.12
(Excerpts Of Transcript
Of Proceedings)..... App.13
(Constitution Of The
United States, Amendment
V)..... App.17

(Constitution Of The
United States, Amendment
VI)..... App.18

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.____

JAMES E. FULCHER,JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner James E. Fulcher, Jr. respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 14, 1980.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgement of the Court of Appeals for the District of Columbia Circuit was entered on March 14, 1980. A timely petition for rehearing en banc was denied on April 17, 1980 and this petition for certiorari was filed within 60 days of that date. On May 19, 1980 this Court extended, to and including June 16, 1980, the time for filing this petition. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) and Rule 22(2) of this Court's Rules.

QUESTIONS PRESENTED

1. During the absence of petitioner, his counsel and the judge, the courtroom clerk responded to a jury note requesting "mail fraud documents." No transcript exists of these events. None of the 183 exhibits had been described as "mail fraud". Petitioner's defense of good faith was in large part dependant upon his exhibits.

The clerk told no one of the notes and her response is unknown. After remand hearings, the appeal court found she "exercised her judgement in determining which of the exhibits were mail fraud" documents.

The possibility of prejudice exists because whatever was delivered to the jury would have led them to believe they received all they asked for. Had the jury wanted exhibits showing mail fraud, any exhibit sent would be interpreted as showing guilt. Had the jury wanted exhibits showing good faith, they should have been sent all good faith exhibits not a token number. The speculative variations of error are numerous because the record fails to show the meaning of the jury's note or the clerk's response.

The question is whether a constitutional error may be called harmless when it's impossible from the record, including the opinion, to determine the influence the error had on the verdict.

2. Whether the lack of an objection can be the basis for a finding there was no possibility of prejudice when the only reason to object would come from viewing a jury note which counsel had not seen.

3. Whether comments to jurors regarding the length of time it will take to reach a final verdict which may have the effect of hastening the verdict or expecting a unanimous verdict are permissable.

STATUTORY PROVISIONS INVOLVED

Constitution of the United States,

Amendment V (Appendix A 17)

Amendment VI (Appendix A 18)

United States Code, Title 18, Federal Rules of Criminal Procedure, Rule 43, Presence of the Defendant

> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

United States Code, Title 18, Federal Rules of Criminal Procedure, Rule 52, Harmless Error and Plain Error

> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

Petitioner was charged on December 5, 1974 in an 11 count indictment filed in the United States District Court for the District of Columbia with violation of 18 U.S.C. 1341 (Mail Fraud), 18 U.S.C. 1342 (Use of False Name), 18 U.S.C. 1343 (Wire Fraud) and 22 D.C. Code 1301 (False Pretenses). After a trial by jury a guilty verdict was returned on April 14, 1976 on eight counts. Petitioner was sentenced on May 19, 1976 to a maximum of 11 years imprisonment. Notices of appeal to the United States Court of Appeals for the District of Columbia Circuit were filed on June 1, 1976 and June 10, 1976.

Motions to proceed in forma pauperis were filed in the District Court in May, 1976, and the Court of Appeals in July, 1976. They were denied and a petition to this Court for a writ of certiorari, based on whether petitioner should be allowed to proceed in the Court of Appeals in forma pauperis, was denied in January, 1977.

Petitioner controlled and managed a number of small companies which performed services for residents of the Baltimore and Washington metropolitan areas.

The companies went out of business and a number of the company's customers and creditors lost money as a result. The indictment, trial, conviction and appeal followed.

The Court of Appeals reversed the judgements on five counts and instructed their dismissal. The three remaining counts are the subject of this petition.

Good faith was petitioner's defense at trial, with testimony and documents showing transactions with satisfied customers.

Admitted into evidence were a total of 183 exhibits of which 78 were submitted by the petitioner and 105 by the government. The exhibits were considered by petitioner to show his good faith. In the closing argument, petitioner's counsel repeatedly urged the jury to ask for and review the exhibits. (Tr 4/13/76 p 30-31).

The exhibits were not to be sent to the jury room unless the jury asked for them and petitioner and his counsel were to be present during deliberations in the

event that the jury should send a note. (Tr 4/13/76 p 85, 87-89).

Jury notes were not brought to the attention of petitioner or his counsel before the verdict was returned and no objection was noted. The record shows two notes from the jury requesting documents. One read, "Request we would like to see mail fraud documents", and the other stated, "We request the contract documents."

The trial which lasted four weeks and had over 70 witnesses was characterized by relatively short days with the jury leaving by 3:30 or 4:00 p.m.. Two hours after jury deliberations began the following exchange took place and no objection was noted.

THE COURT: Gentlemen, I plan to discharge the jury until 9:00 o'clock tomorrow morning.

Bring them in.

(Jury enters the courtroom.)

THE COURT: Are you the foreperson of the jury;

FOREPERSON: Yes, sir.

THE COURT: What is your name, sir?

FOREPERSON: Edward High, H-i-g-h, Edward High.

THE COURT: Mr. High, would your efforts, do you think, be productive if you

continued, if the members of the panel continued their deliberations through the night?

FOREPERSON: The rest of the evening, you say?

THE COURT: Yes.

FOREPERSON: I better make some telephone contact.

THE COURT: No, no, you just speak.

Do you think if you deliberated for the next several hours that you could reach a final verdict? If not, I will have you come back.

FOREPERSON: I am pretty sure it could be done, yes, sir.

THE COURT: Well, I see some disapointment on the faces of some other members.

. . .

THE COURT: Now, do not remove from the jury room any papers on which you have written any comments.

See that any exhibits -- do not remove any exhibits there. The Marshal and Miss Angel will see that they are picked up and will see that you have them in hand tomorrow morning.

Hopefully, coming in tomorrow morning, come in with a fresh start, you will be more productive. (Tr. 4/13/76 p 90-91).

During review by the Court of Appeals the record was remanded to the Trial Court for a hearing and findings on the issue of whether petitioner was prejudiced by response to jury notes during his absence. (Ct. of App. Remand Order and Memorandum, 9/18/79). On December 20, 1979, after hearings, the Trial Court responded with a "Memorandum on Remand." The opinion of the Court of Appeals, attached hereto, summarized that memorandum.(A 5-8). The opinion noted two reasons to conclude there was no reasonable possibility of prejudice. Petitioner had failed to object and the District Court found almost all the exhibits fell into the category of either contract or mail fraud documents.

Petitioner also contended in the Court of Appeals that the trial judge's comments may have hastened the jury's verdict or left the impression he wanted a dispositive verdict. (App. Main Brief in C.A. p 27). This was considered by the Court of Appeals, but is not discussed in their opinion.

REASONS FOR GRANTING THE WRIT AS TO QUESTIONS NUMBER ONE AND TWO

1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRINCIPALS FOR DETERMINING WHETHER A CONSTITUTIONAL ERROR MIGHT HAVE CONTRIBUTED TO THE VERDICT

When from the record, including the opinion, it's impossible to determine the effect a constitutional error had on the verdict the possibility of prejudice must be assumed. Likewise, potential prejudice exists if the nature and manner of the information sent to the jury might have contributed to the verdict. Rogers v. United States, 422 U.S. 35, 39 (1975); Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963).

The below opinion found consitutional error but then failed to follow it's findings of fact on the question of potential prejudice. The opinion stated the trial judge, petitioner and his counsel were absent when the jury sent notes asking to see "mail fraud" and "contract" documents. "The response to the jurors' notes required the courtroom clerk to exercise her judgement in determing which of the exhibits were 'mail fraud' or 'contract' documents. In these circumstances counsel for the defendant should have been told of the jury's request. Informed of the notes, counsel would have

been in a position to make certain that all the requested documents, and no others went to the jury room." (Opinion A 8).

The basis for the Court of Appeals finding that the record excludes any possibility of prejudice is centered on two reasons. One, the failure to object at trial, is addressed by petitioner at page 15 herein.

The other reason is the trial court's finding that the "documents of both the government and the defendant fell into the category of either contract or mail fraud documents." (Opinion A 8). However, this statement does nothing to remove the possibility of prejudice.

It emphasizes the problem, for since the government conceded "none of the exhibits on their face, reflect any wrong-doing" the most that can be said is because this was a mail fraud trial the exhibits could be called mail fraud documents.

The finding that the jury's request could encompass almost any of the exhibits demonstrates the note's vagueness.

The record shows the possibility of prejudice exists. Petitioner's defense

was one of good faith. This point was argued to the jury by petitioner's attorney as he implored them to ask for the exhibits to see the good faith efforts. (Opinion A 6, Jury Argument A 13-17). Accordingly, the trial court had instructed the jury: "You are instructed that good faith is a complete and absolute defense to the crimes... (Defendant) has also offered testimony and documentary evidence in support of this defense."

"In determining whether the defendant acted in good faith or with the intent to defraud, you as jurors should consider all the facts and circumstances in evidence and the inferences to be drawn therefrom..." (Tr. 4/13/76 p 67, 68 emphasis added).

After being instructed the documents were available for the jurors' inspection and should be considered in determining the element of intent it follows that, if they failed to receive the documents, petitioner's testimonial good faith evidence and closing argument would likely be rejected.

Whatever was deliverd to the jury would have led them to believe they received all they asked for. Had they

wanted exhibits showing mail fraud any exhibit sent would be interpreted as showing guilt. Had they wanted exhibits showing good faith, all good faith exhibits should have been sent, not a token number. The speculative variations of error are numerous because the record fails to show the meaning of the jury's note, or whether the clerk sent one or one hundred documents.

The opinion below shows petitioner was absent, no transcript, a vague jury note and an unknown response whereby the courtroom clerk exercised her judgement in determining which exhibits were mail fraud documents. These circumstances preclude determination of the effect this constitutional error had on the verdict and the potential for prejudice must be assumed. A departure of this magnitude from the principals of this Court calls for review.

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL AS TO THE POSSIBILITY OF PREJUDICE IN THE ABSENCE OF TRANSCRIPT OR WHEN THE MEANING OF A JURY NOTE IS UNCLEAR

The Second Circuit in United States v.

Schor, 418 F.2d 26, 30 (1969) found a jury note was unclear and impossible to answer intelligently in it's present form. Consequently, they were unable to say the answer, which was known but made in counsel's absence, did not affect the jury's verdict.

The Ninth Circuit in Bustamante v. Eyman, 456 F.2d 269, 275 (1972) considered the problem of the defendant's absence, even though his attorney was present, during a replaying of taped jury instructions. After a thorough expounding of the relevant case law the Court found because there was no transcript they could not say, inter alia, "whether the tape recording was a full, complete and accurate recording of the original instruction." Accordingly, they were unable from the record to determine if the error was harmless.

Both the Second and Ninth Circuit's possibility for error are contained in the instant case. The jury note is ambiguous, and the response is unknown because there is no transcript. This conflict justifies the grant of certiorari to review the judgement below.

3. THE DECISION BELOW WEAKENS THE IMPORTANT CONSTITUTIONAL RIGHT OF APPEAL AND REVIEW BY UNDERMINING THE PROTECTION GUARANTEED THROUGH AN ATTORNEY'S PRESENCE AND A TRANSCRIPT

Right to be present errors are often associated with the handling of jury notes. This stage of trial frequently takes place out of counsel's presence and unprotected by a transcript. Adequate appeal and review are crippled. Handicapping of a defendant to this extreme places the burden on the government to show harmless error. Chapman v. California, 386 U.S. 18, 24 (1966). The below decision warrants review to avoid errosion of these safeguards.

4. THE DECISION BELOW IS IN DIRECT CONFLICT WITH ROGERS V. UNITED STATES AS TO FAILURE TO NOTE AN OBJECTION

Failure to note an objection was assigned by the Court of Appeals as a basis to conclude there exists no reasonable possibility of prejudice. (Opinion A 8). In Rogers v. United States 422 U.S. 35, 39 (1975), which also addressed the issue of a defendant's right to be present, an almost identical contention

was rejected.

These comments by the trial judge reasoned the opinion, should have alerted petitioner to file an objection. "Now, do not remove from the jury room any papers on which you have written any comments. See that any exhibits -- do not remove any exhibits there. The Marshall and Miss Angel will see that they are picked up and will see that you have them in hand tomorrow morning." (Tr. 4/13/76 91).[1/]

Knowledge of exhibits being in the jury room would not have triggered an objection. Any exhibits sent to the jury should have been pursuant to a clear, not ambiguous, request. Petitioner would have assumed the jury had been provided with what they asked for.

Knowledge of the jury note contents provided the only basis for objection. But, the clerk did not inform counsel or the trial judge of the notes. (Opinion A 7).

1/ Emphasis added to show actual transcript. Opinion at A 7 uses the word "all" which was adopted from the Trial Court's Memorandum on Remand dated 12/20/79 p 3.

Not until after the trial during inspection of the record did petitioner see the two notes and their vague request for what could be any of the exhibits. (App. Main Brief at 25). The notes read "we request the contract documents" and "request we would like to see mail fraud documents". (Opinion A 5).

As this Court stated in Rogers, under similar circumstances, we "acknowledge that the comments of the trial judge upon receiving the verdict may be said to have put petitioner's counsel on notice that the jury had communicated with the Court, but the only indication (of the error) comes from the note itself..." 422 U.S. 35, 39 (1975). The decision below is in direct conflict with Rogers and warrants review.

REASONS FOR GRANTING THE WRIT AS TO QUESTION NUMBER THREE

5. THE DECISION BELOW CONFLICTS WITH OTHER COURTS OF APPEAL IN THE IMPORTANT CONSTITUTIONAL AREA OF WHETHER A JURY'S VERDICT MAY BE HASTENED

Any comment which might be construed as an attempt to hasten the jury in the reaching of a verdict should be scrupulously

avoided. Any attempt to set a time limit on the jury deliberations is improper. 1 Devitt & Blackmar - FJP & I 3rd Ed. Section 5.19 n. 38, p 152.

The First Circuit in United States v. Flannery, 451 F.2d 880,883 (1971) noted "the implicit suggestion, although doubtless unintended, was that it was more important to be quick than to be thoughtful." The Tenth Circuit in Burroughs v. United States, 365 F.2d 431, 434 (1966) stated when a judge infers he is anxious to reach a quick verdict he undermines the jury system by "verdict-urging." Such" statements go to the heart of the judge-jury relationship as it affects the fundamental right to a fair and impartial trial."

The instant case took four weeks, over 70 witnesses and almost 200 exhibits. After the jury had been deliberating two hours, without warning to counsel, the trial judge questioned the jury as to the length of time it would take them to reach a final verdict. (See Statement of Case at p 7 herein). The impact on the jury was that the trial court expected a quick verdict. The clear inference was the issues being tried are simple, the jury had been unproductive, and a dispositive verdict

should be reached quickly.

Time pressures created in the minds of jurors are impermissable. Regardless of whether it's done in a benign and impromptu manner the jury may not be hurried to a final verdict. These conflicts and the importance of the issue justify the grant of certiorari.

6. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRINCIPALS PROHIBITING REQUIREMENTS THAT A JURY REACH A DISPOSITIVE VERDICT

Comments which lead jurors to believe the Court expects a dispositive verdict are impermissable. United States v. United States Gypsum Co. ET AL. 438 U.S. 422, 459-462 (1977); Jenkins v. United States, 380 U.S. 445 (1965). A trial court's reference to a jury being "productive" and "reaching a final verdict" are within this prohibition. Litigents have a right to rely on a "no verdict outcome." This conflict justifies the grant of certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgement and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted.

James E. Fulcher, Jr., Pro Se
10739 Tucker Street Suite 201
Beltsville, Maryland 20705
Petitioner

June 16, 1980

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1714

UNITED STATES OF AMERICA

v.

JAMES E. FULCHER, JR., APPELLANT

Appeal from the United States District Court for the District of Columbia

(Criminal No. 74-720)

Argued June 3, 1979

Decided March 14, 1980

Judgment entered this date

James E. Fulcher, Jr., pro se.

John H. E. Bayly, Jr., Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry*, and *John T. Kotelly*, Assistant United States Attorneys were on the brief, for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Also *Carl S. Rauh*, Assistant United States Attorney, entered an appearance for appellee.

Before: LEVENTHAL* and ROBB, *Circuit Judges*, and OBERDORFER**, *United States District Judge* for the District of Columbia

Opinion for the Court filed by *Circuit Judge* ROBB.

ROBB, *Circuit Judge*: In the District Court the defendant Fulcher was convicted on an indictment in several counts charging him with mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343) and false pretenses (22 D.C. Code § 1301). The court imposed sentences on all the counts and provided that sentences on the false pretenses counts would be served consecutively to the sentences on the mail and wire fraud counts.

At trial the defendant was represented by retained counsel but also participated *pro se*. On this appeal he filed a brief *pro se* and orally argued his own case.

The government's case at trial was that through one or more so-called "home improvement" companies the defendant schemed to defraud and did defraud contractors, suppliers, and customers who paid for projected home improvements. The mail and wire fraud counts of the indictment recite that the defendant carried out his scheme by means of misrepresentations concerning the ability, experience, financial statuts, and organization of his companies, identified as Duraseal Industries, Inc., American General Home Improvement Company, Inc., and Massland Corporation. The alleged false representations are set out in detail in the first count charging mail fraud. Counts two and three, alleging mail and wire fraud, respectively, reallege and incorporate by reference

---

* Circuit Judge Leventhal was a member of the panel which considered this case but died before the opinion was issued.

** Sitting by designation pursuant to 28 U.S.C. § 292(a).

the detailed allegations of count one. The false pretenses counts, four through eight, allege only that the defendant obtained specified sums of money from certain named customers by false representations, upon which they relied, and that "[t]he representations referred to herein are the false representations that the defendant, through American General and Massland, intended to perform the home improvement work contracted for by the named customer." Citing *Chaplin v. United States*, 81 U.S. App. D.C. 80, 157 F.2d 697 (1946), Fulcher moved the District Court to strike counts four through eight on the ground that those counts failed to state an offense. His motion was denied.

The defendant attacks his conviction on a number of grounds. Although we have considered them all we deal here with only those which require discussion.

Relying on *Chaplin v. United States*, *supra*, Fulcher says that a false representation that he intended to perform home improvement work, as alleged in counts four through eight, is not sufficient to support a conviction of false pretenses. The *Chaplin* case holds that such a representation of present intention to perform in the future is not enough because it does not relate to a present or past existing fact. 81 U.S. App. D.C. at 81, 157 F.2d at 698. Although the government attacks the rationale of *Chaplin*, that case states the law of this circuit and we are bound by it.

Apparently recognizing that counts four through eight standing alone do not meet the test of *Chaplin*, the government in its brief argues that

> [A]ppellant's obvious error in argument is to focus on the condensed language of counts four through eight to utter exclusion of the lengthy and precise litany of misrepresentations set forth in count one and thereafter necessarily incorporated into counts

> four through eight by direct reference to appellant's corporate activity. Read as an integral document, the indictment charges misrepresentation by appellant's *modus operandi* through his corporate creatures.

(Br. p. 69)

The difficulty with this argument is that unlike counts two and three, counts four through eight do not refer to the allegations of misrepresentation contained in count one, nor is anything said in counts four through eight about the defendant's representations concerning the qualifications of his corporations; the only misrepresentation alleged is that he falsely represented his intention "through American General and Massland to perform the home improvement work contracted for."

The allegations of the first count are not "necessarily incorporated" in the others. Each count in an indictment is regarded as if it was a separate indictment. *Dunn v. United States*, 284 U.S. 390, 393 (1932). Each count must stand on its own, and cannot depend for its validity on the allegations of any other count not specifically incorporated. United *States v. Huff*, 512 F.2d 66, 69 (5th Cir. 1975); *United States v. Gordon*, 253 F.2d 177, 180 (7th Cir. 1958); *United States v. Pearce*, 275 F.2d 318 (8th Cir. 1960); *see* FED.R.CRIM.P. 7(c). The false pretenses counts cannot absorb by osmosis the allegations of the mail fraud count.

The government cites *Randle v. United States*, 72 App. D.C. 368, 113 F.2d 945, *cert. denied*, 311 U.S. 683 (1940), for the proposition that the indictment must be read as "an integral document." What the government overlooks is that the court in *Randle* was considering an indictment in a single count which the court said "plainly described numerous false representations of present and past facts." 72 App. D.C. at 370, 113 F.2d at 947. The government also overlooks the *Randle* court's reference to "the familiar proposition that to be the proper

subject of an indictment for obtaining money by false pretenses the misrepresentations must relate to present or past facts, as distinguished from something to take place in the future," a proposition which the court said "is correct." *Id.*

In summary, we hold that the false pretenses counts, counts four through eight in the indictment, fail to state an offense. The defendant's conviction on those counts must be reversed and they must be dismissed.

The defendant says it was error to make the sentences on the false pretenses counts run consecutively to those on the mail and wire fraud counts. Our conclusion that the false pretenses counts must be dismissed makes it unnecessary to reach this question.

The defendant in his brief and argument on this appeal represented that while he and his counsel were not present, and while the jury was deliberating, the court in response to two notes from the jurors sent to the jury room certain documentary evidence. The government concedes that this occurred during the absence of the defendant and his counsel, but says that the error, if any, was harmless.

The record filed in this court reflects that the jury sent out two notes at 4:32 P.M. on April 13, 1976. One note said, "We request the contract documents," and the other, "We would like to see mail fraud documents." The notes are in the record. On each is a notation "4:32 4-13-76".

The stenographic transcript reflects that the jury retired to consider its verdict at 3:43 P.M. on April 13, and were excused at 5:37 P.M. with instructions to return on the following morning. Nothing appears in the transcript about the notes from the jury or the sending of exhibits to the jury room. The transcript does show, however, that when the jury retired at 3:43 P.M. the

court instructed defendant's counsel as follows: "Mr. Carmody . . . you must stay . . . I don't anticipate a verdict between now and 5:30 but if, for example, they come, they send in a note or something of that sort, I want you to be here." Mr. Carmody responded, "All right." (Tr., Apr. 13, 1976, p. 87) The court also instructed the defendant to "be present at all times during the deliberations and if you are not present and communication comes in or a verdict is returned, I will accept the communication and I will accept the verdict without your being here." The defendant responded, "Yes, sir." (Tr., Apr. 13, 1976, p. 89)

The defendant says he or his counsel was entitled to be present when response to the jury's notes was made, so as to know precisely what documents were sent to the jury. The government in its brief points out that in his closing argument to the jury counsel for the defendant urged the jurors "to look at those contracts . . . look carefully at the complete jobs file and look carefully at all of these files which have the customer's account cards." (Tr. Apr. 13, 1976, pp. 30-33) The government notes also that in his charge to the jury the district judge told the jurors that if they indicated a desire to see any of the exhibits they might see them. (Tr., Apr. 13, p. 85)

We were unwilling to review this matter on a record that was silent concerning the circumstances under which documents were sent to the jury. We therefore remanded the record in the case to the District Court for a hearing and findings on that subject. Pursuant to our remand the district judge heard testimony from the defendant Fulcher, his former counsel Kevin Carmody, the prosecuting attorney, the courtroom clerk, and four jurors. On the basis of this testimony the court made findings of fact.

The court found that the jurors' two notes were handed by the foreman to the United States Marshal, who in turn delivered them to the courtroom clerk. The clerk "reviewed the exhibit list and identified the exhibits which had been admitted into evidence. She then determined and assembled the documents requested by the jury, gave them to the Marshal, who in turn delivered them to the jury room." The clerk did not inform the court, counsel, or the defendant that the notes had been received or that documents had been sent to the jury. She explained that if the request for exhibits had not been "clear or plain on its face" she would have consulted the court. It was the policy of the court however that the courtroom clerk was required to inform the court of all notes requesting exhibits, even though a prior understanding with respect to such requests had been reached with counsel.

The court found that when the jury was excused on the afternoon of April 13, 1976, to return the next day, it was apparent to counsel and the defendant that the jury had received certain exhibits, for at that time, in the presence of the defendant and his counsel, the court directed the Marshal and the clerk to collect all the exhibits which the jurors had received. The clerk and the Marshal were ordered to make these exhibits available to the jury when it returned.

Finally, the court found "that with only limited exceptions, the admitted documents of both the government and the defendant fell into the category of either contract or mail fraud documents," and that the documents received by the jury were "only those admitted and about which they had already heard testimony." The court concluded that any prejudice to the defendant resulting from the procedure followed by the courtroom clerk "was at most minimal."

The response to the jurors' notes required the courtroom clerk to exercise her judgment in determining which of the exhibits were "mail fraud" or "contract" documents. In these circumstances counsel for the defendant should have been told of the jury's request. Informed of the notes, counsel would have been in a position to make certain that all the requested documents, and no others, went to the jury room. The clerk's unilateral action deprived counsel of this opportunity and was error. *Rogers v. United States*, 422 U.S. 35, 39 (1975); FED.R.CRIM.P. 43; *Shields v. United States*, 273 U.S. 583, 587-88 (1927); *United States v. Schor*, 418 F.2d 26, 29-30 (2d Cir. 1969); *Walker v. United States*, 116 U.S. App. D.C. 221, 223, 322 F.2d 434, 436 (1963).

Notwithstanding the error in failing to notify counsel, it is plain that the defendant was not prejudiced. The District Court found that almost all the exhibits were either contract or mail fraud documents. There were only a few limited exceptions, none of which the district judge found to have been significant. Furthermore, when the defendant and his counsel learned on the afternoon of April 13 that the jury had received certain exhibits, and that they would be returned to the jury on the following day, no objection was made. In short, the record excludes any reasonable possibility of prejudice to the defendant, and therefore reversal is not required. *Walker v. United States*, 116 U.S. App. D.C. at 222-23, 322 F.2d at 435-36 (1963).

The defendant argues that he was denied due process and a speedy trial by the government's failure promptly to produce certain corporate records which he needed in the preparation of his defense. The record discloses however that the defendant himself requested a number of continuances and that on May 2, 1975, he explicitly waived any demand for a speedy trial. Moreover, it appears that although there was some confusion or mis-

understanding about what records were relevant to the case the prosecutors made no attempt to deny access to any records and the defendant ultimately secured all that he wanted. We must reject the defendant's contention.

Fulcher did not testify at trial, but argued the case before the jury. Although he did not ask the court to instruct the jury concerning his failure to testify the court did so on its own motion. He now contends that by giving this instruction the court undermined his credibility and impaired his defense of good faith. We think however that *Lakeside v. Oregon*, 435 U.S. 333 (1978), is a complete answer to the defendant's argument.

The judgments on counts four through eight are reversed with instructions to dismiss those counts. The judgments on the remaining counts are affirmed.

So ordered.

SUPREME COURT OF THE UNITED STATES

No. A-996

JAMES E. FULCHER, JR.,
Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 16, 1980.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 19th
day of May, 1980

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1714 September Term 1979

United States of America

v. Criminal No. 74-720

James E. Fulcher, Jr., Appellant

Filed Apr 17, 1980

BEFORE: Robb, Circuit Judge; and Oberdorfer* Judge, United States District Court for the District of Columbia

O R D E R

Upon consideration of appellant's (Fulcher) petition for rehearing, it is

ORDERED, by the Court, that appellant's aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT

GEORGE A. FISHER

Clerk

*Sitting by designation pursuant to Title 28 U.S.C. 292 (a).
Circuit Judge Levanthal was a member of the panel in this case, but died and did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1714 September Term, 1979

United States of America Criminal No. 74-720

v. Filed Apr 17, 1980

James E. Fulcher, Jr.,
Appellant

BEFORE: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, and Edwards, Circuit Judges

O R D E R

The suggestion for rehearing en banc filed by appellant (Fulcher) having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, en banc, that appellant's aforesaid suggestion for rehearing en banc is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

JURY ARGUMENT ON BEHALF OF DEFENDANT

Filed March 17, 1978

In the United States District Court for the District of Columbia

United States Of America, Plaintiff,

v.

James E. Fulcher, Jr., Defendant .

Criminal 74-720

Washington, D.C.

Tuesday, April 13, 1976

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for trial before the Honorable BARRINGTON D. PARKER, Judge, and a jury duly empaneled and sworn, in Courtroom Number 19, commencing at approximately 9:30 o'clock a.m.

APPEARANCES:

On behalf of the Government:

JOHN T. KOTELLY, ESQ.
Assistant United States Attorney
Room 3800-D, United States Courthouse
Washington, D.C. 20001
(202) 426-7463

On behalf of the defendant:

KEVIN W. CARMODY, ESQ.
Whiteford, Hart, Carmody & Wilson
815 - 15th Street, N.W.
Washington, D.C. 20006
(202) 638-0465

JAMES E. FULCHER, JR.
The Defendant
Appearing on his own behalf

oOo

Proceedings

Excerpts of Jury Argument by Mr. Carmody on Behalf of Defendant

* * *

(21)
Of Course, you have the use of the evidence, which has been admitted at this trial, and we suggest and we request that if you need that, any of that evidence, please call for it.

* * *

(30-31)
Ladies and gentlemen, the defense, the defendant put into evidence contracts, all the contracts written by Massland and American General. The testimony from the stand is they total approximately 210. We

ask you to look at those contracts. Look at the individuals the Government put on the stand who were not satisfied customers, and it is small compared to the number of contracts.

Now, important here is how many jobs were completed. We put into evidence customer account cards, jobs completed, no balance. We ask you to look at these account cards. Relate them to the contracts. These jobs, we submit, are completed and no balance due. Work was done and we submit satisfactorily. Compare that with jobs not done, small in number.

You have the right to look at this evidence and we suggest that you do that. See how many jobs were completed in July, how many were sold in August and completed in August, in September the same; in October, how many were sold and how many completed.

We think when you go through this and if you do this you will find some very interesting results and we suggest that you do that.

Why are the completed jobs so important? Because they show a state of mind. I told you before, judge the man by his actions.

He was trying to do the work, and all of his employees were trying to do the work. He may not have done everything, but he tried his best.

Take a look at the TV supplement ads. See if there was anything in the TV supplement ads that wasn't in the completed contracts file.

In other words, what they advertised they could do, they did do. They may not have done it every time, but they did try to do it.

And we think this is important. It shows his state of mind.

* * *

(33)

If you find a good faith effort, you should find him not guilty as to all counts.

Look carefully at the contracts, look carefully at the completed jobs file and look carefully at all of these files which have the customer account cards. And you will find that he was trying and, in fact, did do a lot of the work.

The Government talks about two theories here, schemes and misrepresentations -- pardon me -- comming-

ling of funds and misrepresentations. Mr. Fulcher commingled funds, I guess, because he didn't set up an escrow account. There is no law that says you have to set up an escrow account. But you should have some sort of tracking as to a customer's deposit.

Take a look at these account cards. They track a customer's deposit: How much the job was for, how much money was put down, how many credits go to the job. They did do that.

That testimony, this evidence is here for you to look at.

* * * * * * * *

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital , or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeorardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived

of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI (1791)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.